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In The
Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICUS CURIAE BRIEF OF THE JUDGE ADVOCATES ASSOCIATION IN SUPPORT OF PETITIONERS

SCANNED

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QUESTION PRESENTED

The Solomon Amendment, 10 U.S.C. § 983(b)(1), withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers. The question presented is whether the Court of Appeals erred in holding that the Solomon Amendment's equal-access condition on federal funding violates the First Amendment to the Constitution, and in directing a preliminary injunction to be issued against its enforcement.

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AMICUS CURIAE BRIEF OF THE JUDGE ADVOCATES ASSOCIATION

The Judge Advocates Association ("JAA") respectfully submits this *amicus curiae* brief in support of Donald H. Rumsfeld, *et al.*, Petitioners. Pursuant to Supreme Court Rule 37.3(a), this *amicus curiae* brief is filed with the written consent of the parties.[1]

IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

> *"I find it scarcely possible to get along without some legal person in the situation of Judge Advocate."* Letter from Duke of Wellington to the Earl of Bathurst (Jun. 2, 1815) (*quoted in* 5 THE OXFORD ENGLISH DICTIONARY 617 (Oxford 1933 & reprint 1970).

The JAA[2] is a non-profit corporation and national professional society. The JAA was founded in 1943 by a small group of Army Judge Advocates in Washington, D.C. Over fifty years later, the JAA is composed of active duty and retired Judge Advocates of all services as well as private practitioners of military and veterans' law. The American Bar Association (ABA) recognizes the JAA as an affiliate organization and awards it full recognition. As an affiliate of the ABA, the JAA is a member having a vote in

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[1] Counsel for Petitioners, Donald H. Rumsfeld, *et al.*, and Respondents, the Forum For Academic And Institutional Rights, *et al.*, consented to the filing of this *amicus curiae* brief. The letters of consent have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37.6, the JAA represents that no counsel for either party authored this brief in whole or in part and that no person or entity, other than the JAA, its members, and its counsel contributed monetarily toward the preparation or submission of this brief.

[2] "The Judge Advocates Association was, and is, an organization open to military lawyers, active and inactive, of all the armed services. . . . Its support, as a surrogate spokesman . . . [is] vital." Siegel, *Origins of the Navy Judge Advocate General's Corps: A History of Legal Administration in the United States Navy, 1775 to 1967*, 584 (1997).

the ABA House of Delegates and has raised many issues of concern to Judge Advocates and practitioners of military and veterans' law since its inception.

Judge Advocates and members of the JAA represent, counsel, and defend the men and women who defend our great nation. By assisting commanders in the administration of military justice and providing support to ongoing military operations around the globe, Judge Advocates perform a critical function to the national security of the United States. This is not new. Consistent with this ancient and 21st Century role, the JAA seeks to ensure that the armed forces recruit and retain highly talented graduates of our nation's law schools.

The origins of the Judge Advocate and the Judge Advocate General's Corps are rooted deeply in our history. In his classic treatise on military law, Winthrop remarked that "The province of the Judge Advocate, as now understood, appears to have first become defined in the British Articles of the seventeenth century."[3] This officer, "The judge marshal, by some styled auditor-general, and since called judge advocate, was an officer skilled in the civil, municipal and martial laws: his office was to assist the marshal or general in doubtful cases."[4] Our own military was scarcely six weeks along when Congress appointed William Tudor Judge Advocate of the Army on July 29, 1775.

The JAA submits this brief to demonstrate that the application of the Solomon Amendment is a constitutional and highly effective means of recruiting quality law students to the Judge Advocate General's Corps.[5] Denying military recruiters the access needed to conduct on-campus interviews will have a detrimental impact on the

[3] W. Winthrop, *Military Law and Precedents* 179 (2d ed. 1896 & reprint 1920).

[4] *Id.* (quoting 1 F. Grose, *Military Antiquities* 235 (London 1786-88)).

[5] The term "Judge Advocate General's Corps" is used in this brief to classify all Judge Advocates serving in the United States Armed Forces.

Judge Advocate General's Corps and hinder their ability to contribute to the national security of the United States.

SUMMARY OF ARGUMENT

This case involves a First Amendment challenge to the Solomon Amendment, 10 U.S.C. § 983(b)(1). The Solomon Amendment is a federal statute that withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers.

Under the Solomon Amendment, as it stands today, certain public funds are not provided to an institution of higher education, or a subelement of that institution, if the institution or subelement has a policy or practice that prohibits, or in effect prevents military recruiters from gaining access to campuses or students "in a manner that is at least *equal* in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b)(1) (emphasis added).

The JAA submits this brief in support of Petitioners and argues in favor of the constitutionality of the Solomon Amendment. Moreover, the JAA seeks to alert this honorable Court of the detrimental impact on the United States Armed Forces' ability to recruit and maintain qualified individuals caused by the Court of Appeals determination that the Solomon Amendment is unconstitutional. "[T]he Nation has a vital interest in having a system for raising armies that functions with maximum efficiency . . . " *United States v. O'Brien*, 391 U.S. 367, 381 (1968). Effective military recruiting is essential to that system. Particularly in this time of war, denying military recruiters the access needed to conduct on-campus interviews will have a devastating impact on the Armed Forces' ability to recruit the talented individuals necessary to protect national security and defend the Constitution of the United States.

ARGUMENT

I. The Solomon Amendment is a valid exercise of the Congressional Spending Power under the Constitution.

Congress has the solemn duty "[t]o raise and support armies . . . [and] to provide and maintain a navy" for the defense of the United States. Const. art. I, § 8, cl. 12-13. The Solomon Amendment, 10 U.S.C. § 983(b)(1), was enacted under Congress's plenary spending power to "provide for the common Defense and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Congress's power under the spending clause, coupled with the necessary and proper clause, is very expansive, *Buckley v. Valeo*, 424 U.S. 1, 90 (1976), and includes the authority to attach conditions to the receipt of federal funds. *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

As early as 1862 Congress placed conditions on the receipt of higher education funding, requiring universities and their subelements to provide assistance in military recruiting efforts. *See* The Morrill Act of 1862, ch. 130, § 4, 12 Stat. 504. Land grant colleges, to this day, are required to include in their curriculum courses on "military tactics." *Id.* (codified at 7 U.S.C. § 304).

When acting pursuant to the spending power, U.S. Const. art. I, § 8, cl. 1, which includes providing for national defense, "Congress may attach conditions to the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole,* 483 U.S. 203, 206 (1987). The "constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *Id.* at 209 (citing *United States v. Butler,* 297 U.S. 1 (1936)). Further, judicial deference "is at its apogee" when reviewing "legislative action under the congressional authority to raise and support" the military. *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

The Solomon Amendment remains a valid exercise on Congress's spending power so long as the conditions it places on the law schools do not rise to the level of an independent constitutional violation. *See Dole,* 483 U.S. at 208-212. As the conditions Congress has placed on law schools under the Solomon Amendment pass the strictest of scrutiny, the alleged intrusion on Respondent's First Amendment interests falls short of a constitutional violation.

II. The equal-access requirement of the Solomon Amendment is valid, despite any incidental impact on free expression, because it passes constitutional muster under both the expressive association analysis in *Dale* and the standard announced in *O'Brien* for regulations which indirectly affect free expression.

This honorable Court has held that the right of expressive association may be limited by government action necessary to serve a compelling interest unrelated to the suppression of ideas. *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (citing *Buckley*, 424 U.S. at 25). Relying on *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), the Court of Appeals elaborated on the strict scrutiny test in the expressive association context and held that, "[a] regulation that disrupts an expressive association or compels speech must be narrowly tailored to serve a compelling governmental interest, and must be the least restrictive means of promoting the government's asserted interest." *Forum for Academic and Institutional Rights (FAIR) v. Rumsfeld,* 390 F.3d 219, 230 (3d Cir. 2004). *See also Pac. Gas and Elec. Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 19 (1986). The Circuit Court erred, however, when it concluded that enforcement of the Solomon Amendment is not narrowly tailored to serve a compelling government interest and is not the least restrictive means of promoting that interest. *See FAIR,* 390 F.3d at 242. As the equal-access requirement of the Solomon Amendment does indeed survive

strict scrutiny, it necessarily meets the intermediate scrutiny test, which arguably is the more appropriate standard, set forth in *O'Brien*.

A. The Congressional interest in recruiting top-quality Judge Advocates is compelling, as these military lawyers are critical to national security, ongoing wartime operations, and the maintenance of a well-disciplined fighting force.

Congress has the independent constitutional power to "[t]o raise and support armies . . . [and] to provide and maintain a navy. . . . " Const. art. I, § 8, cl. 12-13. Further, the Constitution enables Congress "[t]o make all laws which shall be necessary and proper" for maintaining a strong military and defending our nation. Const. art. I, § 8, cl. 18. Courts have also recognized that, "Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance." *United States v. City of Phila.*, 798 F.2d 81, 86 (3d Cir. 1986). When analyzing the congressional interest behind the Solomon Amendment, significant deference must be afforded Congress, as they acted under the congressional authority to raise and support the United States Armed Forces. *Rostker*, 453 U.S. at 70. In amending the Solomon Amendment to its current form, Congress found that

> [A]t no time since World War II, has our Nation's freedom and security relied more upon our military than now as we engage in the global war on terrorism. Our Nation's all volunteer armed services have been called upon to serve and they are performing their mission at the highest standard. The military's ability to perform at this standard can only be maintained with *effective and uninhibited* recruitment programs.

H.R. Rep. No. 108-443(I), at 3-4 (2004) (emphasis added).

Judge Advocates are responsible for the administration of military justice. They also support "a full spectrum

of domestic and international military operations ranging from combat operations to humanitarian civic assistance and disaster relief operations."[6] Judge Advocates in the Marine Corps are also unrestricted line officers, meaning that they may be asked to serve in non-legal billets at any time.[7]

As this honorable Court has recognized, Judge Advocates, as military officers, hold "a particular position of responsibility and command in the Armed Forces: 'The President's commission . . . recites that 'reposing special trust and confidence in the patriotism, valor, fidelity and abilities of the appointee he is named to the specified rank during the pleasure of the President.'" *Parker v. Levy*, 417 U.S. 733, 743 (1974) (citing *Orloff v. Willoughby*, 345 U.S. 83, 91 (1953)). Judge Advocates also take an oath "to support and defend the Constitution of the United States of America against all enemies, foreign and domestic . . . " Estes, *The Marine Officer's Guide* 225 (6th ed. 1996). From the founding of our Nation to this day, Judge Advocates "assist commanders in the administration of military justice in order to maintain morale, good order, and discipline within the ranks . . . thereby strengthening the national security of the United States."[8]

In the early courts-martial proceedings, the 1776 Articles of War required that Judge Advocates be "assigned to the court to prosecute in the name of the United States and to act as a counsel for the accused." Schlueter, *Military Criminal Justice: Practice and Procedure* 32 (6th ed. 2004) (citing Article 6). In the 1916 and 1920 enactments of the Articles of War, Congress mandated the

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[6] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 2, *FAIR* (No. 03-4433). "More than 240 Air Force [judge advocates] provide a permanent forward presence in over 40 locations in 19 foreign countries." *Id.* at 3.

[7] Report of the Staff Judge Advocate to the Commandant of The Marine Corps, Presented to the American Bar Association Mid-Year Meeting 1, 3 (Feb. 11-12, 2005).

[8] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 3, *FAIR* (No. 03-4433).

appointment of a Judge Advocate to all general and special courts-martial. *Id.* at 38 (citing Articles 11, 17). Under the Selective Service Act of 1948, which was enacted to "provide for the common defense" and "insure the security of this Nation," Congress required that the Judge Advocates of the service branches be "members of the bar of a Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General." 80 Cong. ch. 625, §§ 1, 206-208, 62 Stat. 604, at 604-605, 629. In today's military, almost every court-martial includes a member of the Judge Advocate General's Corps who has graduated from an ABA-accredited law school. *See* Schlueter, at 441. Further, this honorable Court has recognized that service as a Judge Advocate "includes the potential for service as a military judge." *Weiss v. United States,* 510 U.S. 163, 190 (1994) (Justice Souter concurring). Consequently, Judge Advocates "are vested with various supervisory powers over the military justice system." Schlueter, at 1092.

Today, Judge Advocates are fulfilling their critical role in "legally intensive, complex military operations" throughout the world.[9] Judge Advocates from all branches provide active-duty service members with legal assistance which "continues to be a critical component" in maintaining readiness, welfare, and morale.[10] Judge Advocates assist in the deployment of service members "by ensuring that a host of legal matters, to include addressing pending civil matters and preparing and executing wills and powers of attorney, are completed prior to a" service member's deployment.[11]

[9] Judge Advocate General's Corps, United States Army, Semiannual Historical Summary of the Judge Advocate General's Corps, Presented to the ABA 1 (Feb. 2005).

[10] Report of the Judge Advocate General's Corps of the United States Air Force to the ABA, Midyear Meeting 23 (Feb. 11-12, 2005).

[11] Declaration of Brigadier General Walter E. Gaskin, United States Marine Corps, at 2-3, *FAIR* (No. 03-4433).

In addition to the more traditional roles of acting as counsel in courts-martial and providing legal services, Major General Thomas J. Romig, U.S. Army, recently explained the vital function Judge Advocates perform in the ongoing Operation Iraqi Freedom and Operation Enduring Freedom (Afghanistan):

> During . . . combat operations, judge advocates provide[] critical international law support involving such topics as the legal basis for the use of force, rules of engagement, capitulation, parole and local cease fire agreements, civilians on the battlefield, war crimes investigation, negotiations with armed groups, the wearing of nonstandard uniforms, and child soldiers on the battlefield. Judge advocates are critical and much relied upon members of the military commander's staff, and move when and where their units move.[12]

Judge Advocates play a large role in building nontotalitarian governments in Iraq and Afghanistan by reestablishing the judicial systems and developing the rule of law.[13] In passing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Congress reinforced the necessity of having forward-operating Judge Advocates providing independent, legal advice to commanders in the field. *See* Pub. L. No. 108-375, § 574, 118 Stat. 1811 (2004). Ongoing combat operations in Iraq and Afghanistan have dramatically increased the demand for top-quality Judge Advocates.[14] Brigadier General Kevin M. Sandkuhler, Staff Judge Advocate to the Commandant of

[12] Declaration of Major General Thomas J. Romig, U.S. Army, at 4, *FAIR* (No. 03-4433).

[13] *See* Judge Advocate General' Corps, United States Army, Semiannual Historical Summary of the Judge Advocate General's Corps, Presented to the ABA 40-42 (Feb. 2004).

[14] Report of the Staff Judge Advocate to the Commandant of the Marine Corps, Presented to the ABA Mid-Year Meeting 4 (Feb. 2004).

the Marine Corps, recently commended a Judge Advocate wounded in the battle of Fallujah:

> As the battalion's staff judge advocate, this Marine was responsible for detainee processing, oversight of contract interpreters, liaison with tribal leaders, providing humanitarian assistance (claims condolence payments), briefing rules of engagement, and drafting the legal annex to the battle plan for Operation Phantom Fury (Fallujah). *During the battle, this Marine judge advocate fought over six hours in streets and alleys firing his rifle and directing crew served weapons until he was severely wounded by a rocket propelled grenade and medically evacuated."*[15]

"[Judge Advocates] are serving with distinction in challenging billets around the world, including Iraq, Afghanistan, and Guantanamo Bay, Cuba, and in a multitude of at sea and other forward-deployed locations. Their contributions to the defense of our nation are many and significant."[16] Where do we get such selfless young men and women? We get them from the law schools that instill in them the public service ethic and skills necessary for the protection and defense of freedom, on the battlefield and off.

There is compelling government interest in ensuring that top-quality Judge Advocates continue to contribute to the defense of our nation. It is absolutely critical that we maintain the most effective recruiting measures in order to continue to fill the ranks of Judge Advocates with top-quality law students from around the nation. This includes the on-campus interview as it is the most critical part of

[15] Report of the Staff Judge Advocate to the Commandant of The Marine Corps, Presented to the ABA Mid-Year Meeting 8-9 (Feb. 11-12, 2005) (emphasis added).

[16] Report of the Judge Advocate General of the United States Navy, Presented to the ABA Annual Mid-Year Meeting 18 (Feb. 4-10, 2004).

the Judge Advocate recruiting process.[17] Even if the application of the Solomon Amendment does work some slight infringement on the law schools' right of expressive association, that infringement is justified because it serves the compelling government interest in raising and supporting a strong military and national defense. *See Rotary Club of Duarte*, 481 U.S. 537.

B. The equal-access requirement of the Solomon Amendment is narrowly tailored to the Congressional interest, and is the least restrictive means of recruiting top-quality Judge Advocates, and thus any effect on free expression is no greater than is essential.

As this honorable Court has held, "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

The United States military continues to demand increasing numbers of new Judge Advocates.[18] The drastic increase in deployments has presented significant challenges to Judge Advocates in providing legal support to commanders, U.S. service members,[19] and their families. The enforcement of the Solomon Amendment is essential to supporting and maintaining the military, especially considering the "increasingly challenging recruiting

[17] Declaration of Rear Admiral Jeffrey L. Fowler, United States Navy, at 3, *FAIR* (No. 03-4433).

[18] *See* Report of the Judge Advocate General of the United States Navy, Presented to the ABA Annual Mid-Year Meeting 15 (Feb. 4-10, 2004).

[19] *See* Judge Advocate General' Corps, United States Army, Semiannual Historical Summary of the Judge Advocate General's Corps, Presented to the ABA 37-38 (Feb. 2004).

environment" brought about by the Global War on Terror.[20] For example, with the enforcement of the Solomon Amendment, Air Force Judge Advocates were able to interview "approximately 2,275 law students representing almost all of the 188 ABA-accredited law schools in the United States."[21] If enforcement of the Solomon Amendment were prohibited, it would create a significant obstacle to Judge Advocate recruiters, one not experienced by other employers, thus placing the military at a disadvantage.

> The denial of equal access to law school campuses hampers the ability of military recruiters to recruit high-quality applicants and, ultimately, our ability to staff [the Armed Forces] with the qualified personnel needed to successfully accomplish the [] mission. Access to law students that is inferior to that provided other employers precludes the [military] from being able to reach potentially interested students in the manner that is most convenient and attractive to the students.[22]

Congress has decided that one of the requirements for serving as a Judge Advocate is to be a graduate of an accredited law school. *See* Article 27(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 827(b)(1). It follows that in filling the ranks of Judge Advocates, the Armed Forces should be allowed to interview and recruit students attending accredited law schools, especially where those schools or their parent universities enjoy federal funding. Because law students attend classes at the law school and often study there as well, it is much easier for the students when employers interview at the

[20] Report of the Judge Advocate General of the United States Air Force, Presented to the ABA Annual Meeting 1 (Feb. 6-7, 2004).

[21] Report of the Judge Advocate General's Corps of the United States Air Force to the ABA, Midyear Meeting 1 (Feb. 11-12, 2005).

[22] Declaration of Brigadier General Walter E. Gaskin, United States Marine Corps, at 4, *FAIR* (No. 03-4433).

law school. By denying equal access, the military is at a competitive disadvantage; law students are given the impression that a career as a Judge Advocate is less desirable than a career in civilian law. If this honorable Court prohibits the enforcement of the Solomon Amendment, the Armed Forces will have to select from a smaller pool of applicants, which will impair the military's "ability to convey the great advantages and opportunities of a legal career in the Armed Forces,"[23] and ultimately result in accession of less talented Judge Advocates.[24] "The military cannot afford to recruit and access less talented candidates, given the complexities and demands of today's military environment."[25]

1. The on-campus law school interview is the most effective means of recruiting Judge Advocates, and is essential to meet accession requirements.

Congress's interest in raising and supporting an effective military is a compelling government interest. To achieve this goal, Congress has a narrowly tailored means of providing military recruiters with access to our Nation's most talented potential Judge Advocates. Each year the United States Armed Forces must recruit hundreds of Judge Advocates in order to effectively defend the nation.[26] The Army alone accesses 270 active and reserve Judge Advocates per year and has had to access an additional 50 active duty Judge Advocates as a result of ongoing operations in Iraq and Afghanistan.[27] Our national security

[23] *Id.* at 5.

[24] Declaration of Major General Thomas J. Romig, U.S. Army, at 9, *FAIR* (No. 03-4433).

[25] *Id.*

[26] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 4, *FAIR* (No. 03-4433).

[27] Declaration of Major General Thomas J. Romig, U.S. Army, at 6, *FAIR* (No. 03-4433).

depends on the good order and discipline of service members, which in turn depends on the quality of Judge Advocates supporting those forces and administering the military justice system. Enforcement of the Solomon Amendment seeks to ensure that the United States Armed Forces have "the same access to law school campuses afforded to other employers so that [they] can interview and access a sufficient number of top-quality attorneys. . . . An unsuccessful recruiting year, either in terms of quality or quantity of applicants," can significantly impair the military force structure for 20 years or more.[28]

Recruiting visits and interviews within the law schools is the most effective means of meeting the requisite accessions into the Judge Advocate General's Corps.[29] For example, among the Judge Advocates currently serving on active duty in the United States Air Force, 75% were recruited through a program which included a law school visit.[30] In the Army, 60% of all new Judge Advocates are recruited from law schools through a process that includes an on-campus interview.[31] The on-campus interview is the only method by which the military "can compete with higher paying employers and meet the strong

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[28] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 4, *FAIR* (No. 03-4433).

[29] Declaration of Brigadier General Walter E. Gaskin, United States Marine Corps, at 4, *FAIR* (No. 03-4433).

> [O]n-campus recruiting is the preferred and most successful method of establishing contact with interested and potentially qualified applicants . . . the most effective method of recruiting potential applicants is to meet with them in person and explain to them what a career as a [] judge advocate would entail and how to go about submitting an application. This exchange is the best tool for recruiting highly qualified judge advocates.

Id.

[30] *See* Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 4, *FAIR* (No. 03-4433).

[31] Declaration of Major General Thomas J. Romig, U.S. Army, at 6, *FAIR* (No. 03-4433).

demand for face-to-face interaction with interested applicants."[32]

On-campus interviews are crucial for two reasons: 1) they provide an essential, face-to-face forum where law students can hear first hand the experience of a young Judge Advocate in today's military as well as ask questions about military law, how it differs from civilian law, and the application process,[33] and 2) the recruiting Judge Advocate is able to make an initial, face-to-face evaluation and assessment of the demeanor and character of the potential applicant, which ultimately becomes a critical component of the application package.[34] The Judge Advocate recruiter "performs vital recruiting duties [] by his or her presence on campus" and conducts "informational seminars about" the Judge Advocate General's Corps as well as interviews.[35] The recruiter provides a human face to the United States Armed Forces and "is often the first judge advocate whom a law student has ever met."[36]

Official surveys indicate that the on-campus interviews appeal "to many law students who had never previously considered a career" as a Judge Advocate.[37] Out of 339 newly-commissioned Judge Advocates, 40% identified the law school recruiting visit as the way they learned about their service branch.[38] In an Army recruiting area which consists of New Jersey, Pennsylvania and Delaware,

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[32] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 6, *FAIR* (No. 03-4433).

[33] *Id.* at 8 ("This type of exchange is invaluable in conveying what joining the [judge advocate] [c]orps really means, on both personal and professional levels, because the students are more comfortable with (and identify with) the young [judge advocate] visiting their school.").

[34] *Id.* at 5.

[35] Declaration of Major General Thomas J. Romig, U.S. Army, at 7, *FAIR* (No. 03-4433).

[36] *Id.*

[37] *Id.* at 8.

[38] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 8, *FAIR* (No. 03-4433).

over 80% of law students who attended an on-campus interview subsequently applied to become Judge Advocates.[39] Nationwide, over 54% of law students attending an on-campus interview subsequently applied to become an Army Judge Advocate.[40]

Over 83% of the Navy's new Judge Advocates "are recruited during their second and third year of law school."[41] Over 50% of the new Navy Judge Advocates "had their first meeting with Navy personnel during an on-campus interview."[42] Half of the Marine Corps' new Judge Advocates "are recruited during their second and third year of law school" through on-campus recruiting methods.[43] The Marine Corps also administers a unique commissioning program whereby aspiring Judge Advocates may become commissioned officers before attending law school. *See* 10 U.S.C. § 16401 (2005). Under this program, access to law schools is even more imperative, as the officer recruiter must monitor the academic eligibility and physical fitness of the Marine law student throughout enrollment at the law school. *See id.*

The Army and the Air Force also utilize the on-campus interviews to hire second-year law students as civilian summer interns. Over 50% of the 2003 Air Force summer interns applied to become Air Force Judge Advocates with 40% being selected.[44] In an Army recruiting area which consists of New Jersey, Pennsylvania and Delaware, over 31% of law students who attended an on-campus interview for the summer internship subsequently

[39] Declaration of Major General Thomas J. Romig, U.S. Army, at 8, *FAIR* (No. 03-4433).

[40] *Id.*

[41] Declaration of Rear Admiral Jeffrey L. Fowler, United States Navy, at 3, *FAIR* (No. 03-4433).

[42] *Id.*

[43] Declaration of Brigadier General Walter E. Gaskin, United States Marine Corps, at 2-3, *FAIR* (No. 03-4433).

[44] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 10, *FAIR* (No. 03-4433).

applied for the internship.[45] Nationwide, over 40% of students who interviewed on-campus subsequently applied for the Army legal internship.[46]

> The [on-campus] recruiting program is thus a critical tool not only in enhancing the academic quality of the applicant pool, but, especially as it pertains to the summer internship program, in maximizing [the] ability to reach out to the widest, most diverse audience possible, thereby increasing [the] ability to field a legal corps representative of the country it serves.[47]

Whereas various programs support the recruiting and retention of Judge Advocates, "the on-campus informational interview is the centerpiece . . . of the recruiting platform. . . ." and the "[c]ontinued presence at law schools . . . will remain central in conveying accurate depictions of the JAG Corps to potential applicants."[48]

2. The government cannot recruit effectively by less speech-restrictive means.

Substantial deference should be given to the professional determinations of our military leaders of how to best ensure top-quality law student leaders are entering the Judge Advocates General's Corps. *See Goldman*, 475 U.S. at 507.

Currently, the service branches "employ[] a number of methods to supplement on-campus interviews as a means of recruiting new" Judge Advocates.[49] The

[45] Declaration of Major General Thomas J. Romig, U.S. Army, at 8, *FAIR* (No. 03-4433).

[46] *Id.*

[47] *Id.*

[48] Report of the Judge Advocate General Corps of the United States Air Force to the American Bar Association Midyear Meeting 1-2 (Feb. 11-12, 2005).

[49] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 8, *FAIR* (No. 03-4433).

branches maintain websites, publish brochures, post openings on Internet job sites, and mail letters directly to second- and third-year law students, and advertise in legal publications.[50] However, these methods, at the very best, can only serve to augment the on-campus interviews, and cannot adequately replace them.[51]

On-campus interviewing is the most successful and feasible means of recruiting new Judge Advocates. It has been suggested that loan repayment programs may be a more narrowly tailored means by which to recruit. *See FAIR,* 390 F.3d at 235. The limited student loan repayment programs employed by the branches are, however, incentives utilized to "*retain*[] experienced judge advocates" rather than as a recruiting device.[52] Further, "the continuing costs of current and future [military] operations threaten the future funding for [loan repayment programs]."[53] Therefore, the United States military may be unable to continue these loan repayment programs at some point in the future. Enforcement of the Solomon Amendment allows the United States military to keep money and manpower where it is needed the most – on the frontlines.

> Increasing the money and manpower devoted to other [alternative] methods of recruiting would

[50] *Id.*

[51] *Id.*

[52] Report of the Staff Judge Advocate to the Commandant of The Marine Corps, Presented to the ABA Mid-Year Meeting 4 (Feb. 11-12, 2005) (emphasis added). "Judge Advocate Continuation Pay (JACP) is designed to provide financial assistance for the majority of [] junior officers on active duty. . . . " Judge Advocate General' Corps, United States Army, Semiannual Historical Summary of the Judge Advocate General's Corps, Presented to the ABA 2 (Feb. 2005). The Navy's JACP is a "valuable retention tool[]" and judge advocates are not eligible until they reach the rank of lieutenant. Report of the Judge Advocate General of the United States Navy, Presented to the ABA, Annual Mid-Year Meeting 12-13 (Feb. 4-10, 2004).

[53] Report of The Staff Judge Advocate to the Commandant of The Marine Corps, Presented to the ABA Mid-Year Meeting 4 (Feb. 11-12, 2005).

> necessarily mean diverting those resources from other demands that they are currently meeting. The growing demands of the current global military environment and our domestic budgetary process are placing increasing constraints on the Department [of Defense's] financial resources and personnel. The resources that would be needed to expand alternative recruiting methods are not lying idly by, waiting to be used; they are already in use. Thus, even if a court-ordered disruption in [law school] campus recruiting efforts could somehow be overcome by other recruiting efforts, [the nation] would pay a price in the diversion of resources required for other parts of the military mission. . . . Developing, funding, and implementing alternative methods of recruiting would unavoidably take time, and we do not have the luxury of living with impaired recruiting capabilities while the process plays out.[54]

While the Armed Forces make "substantial efforts to supplement the efficiency and effectiveness" of the on-campus interview, "there is no method or combination of methods that could replace it if it were lost."[55] The on-campus interview system "is uniquely tailored to fit in the busy law student's demanding schedule, and on-campus access provides a form of direct visibility to the [Judge Advocate General's] Corps that off-campus alternatives cannot match."[56]

> There is no adequate substitute for a personal dialogue between [a Judge Advocate recruiter] and an interested candidate. This personal dialogue allows the [Judge Advocate recruiter] to relate to the applicant and speak to them sincerely from their recent experiences. They can answer

[54] Declaration of Dr. David S.C. Chu, Under Secretary of Defense for Personnel and Readiness, at 4-5, *FAIR* (No. 03-4433).

[55] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 11, *FAIR* (No. 03-4433).

[56] *Id.*

> questions that may arise immediately and remove some of the confusion that may exist regarding what [] judge advocates actually do. Beyond the additional expense involved, neither a TV commercial, a radio advertisement, nor a website can provide the same type of information and target the appropriate audience in the same manner as campus visits do. The ability to proudly walk onto a law school campus, in uniform, and openly talk to a potential applicant is essential to our ability to highlight the many rewards and advantages of a career as a judge advocate. There is no adequate substitute.[57]

This demonstrates that the requirement of equal access is narrowly tailored to further the government's compelling interest, and is the least restrictive means to recruit top-quality Judge Advocates.

Judge advocate recruiting is an economic activity. Any expressive content is strictly secondary to the instrumental goal, which is to recruit qualified men and women to serve as military lawyers and judges. Even if, however, the Court determines that the Solomon Amendment interferes with an educational institution's expressive association or impairs the institution's First Amendment rights by compelling it to propagate, accommodate, and subsidize the military's recruiting message against its will, the Solomon Amendment is still valid because it passes strict scrutiny, that is, it is "a narrowly tailored means of serving a compelling state interest." *Pac. Gas and Elec. Co.*, 475 U.S. at 19.

C. The application of the Solomon Amendment to educational institutions does not violate the right of expressive association afforded under the First Amendment.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S.

[57] Declaration of Brigadier General Walter E. Gaskin, United States Marine Corps, at 6, *FAIR* (No. 03-4433).

Const. amend. I. Respondents argue that the Solomon Amendment impairs law schools' First Amendment rights under the doctrine of expressive association because the law schools' First Amendment right to disseminate their chosen message is impaired by the inclusion of military recruiters on their campuses. This doctrine was most recently addressed by the Supreme Court in *Dale*, 530 U.S. at 640.

In *Dale*, the Supreme Court set forth the elements of an expressive association claim, which include (1) whether the group is an "expressive association," (2) whether the government action at issue significantly affects the group's ability to advocate its viewpoint, and (3) whether the government's interest justifies the burden it imposes on the group's expressive association. 530 U.S. at 648-658.

1. Law schools do not enjoy a right of expressive association.

This honorable Court has illustrated the enormous educational benefit that is derived when a law school is open to the free flow of diverse viewpoints. *See Grutter v. Bollinger*, 539 U.S. 306, 327-34 (2003). The law school's "classroom with its surrounding environs is peculiarly the marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972). The law schools are not speakers, but rather "possess[] many of the characteristics of a public forum." *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). *See United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 206 (2003) (defining a public forum). *See also Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000) *and Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (finding that subelements of universities amounted to forums). As forums, and not speakers, the law schools themselves do not convey ideological viewpoints and should be entitled to limited First Amendment protection. Rather, the law schools are microcosms of society – marketplaces for the exchange of popular and unpopular views. This includes the view that service to our country is honorable.

There is more to the viewpoint that the United States Armed Forces conveys than the constitutional, albeit controversial, "don't ask, don't tell" policy. *See Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996), *cert. denied*, 519 U.S. 948; 10 U.S.C. § 654. The overwhelming message conveyed by our Soldiers, Sailors, Airmen and Marines is one of physical and mental discipline, adherence to a strong moral code, honor, courage, and commitment. It follows that the law schools, as the stewards of the "marketplace of ideas," should allow this message to be heard – allow it to compete freely and fairly with the other messages presented within the halls of these great institutions of justice and public service.

If the law schools do enjoy a right of expressive association, any slight infringement upon that right is justified by the compelling interest in recruiting quality Judge Advocates for service in the United States Armed Forces.

2. The Solomon Amendment does not significantly affect the group's ability to advocate its viewpoint.

Respondents argue that the Solomon Amendment significantly affects the law schools' ability to express their viewpoint that discrimination on the basis of sexual orientation is wrong. In holding that the Solomon Amendment impairs a law school's right to expressive association, the Third Circuit relied heavily on *Dale*. *FAIR*, 390 F.3d 219. In *Dale*, the Supreme Court held that applying New Jersey's public accommodations law to require Boy Scouts to admit a homosexual scout leader violated Boy Scouts' First Amendment right of expressive association. *Dale*, 530 U.S. 640. However, *Dale* can be distinguished from the present case in many ways.

First, the Solomon Amendment requires only that the institutions allow military recruiters equal access. These recruiters are not a part of the law school and do not become members through their temporary presence during the recruiting process. Recruiters speak for the employers

they represent – they do not purport to speak for the law schools they are visiting and cannot reasonably be understood to be speaking for these law schools. Therefore, unlike *Dale*, in the case at bar, the Solomon Amendment does not intrude on the right of educational institutions to determine their membership.

Furthermore, recruiting is an economic activity. Any expressive content is strictly secondary to the instrumental goal, which is to recruit qualified men and women to serve as Judge Advocates. Recruiting is not meant to convey any message beyond the military's interest in enlisting these individuals. Recruiters are not used to instill values in anyone, unlike the role of scoutmasters in *Dale*, whose fundamental goal of the relationship between adult leaders and boys was "[t]o instill values in young people." *Id.* at 650.

Finally, it is a fabrication that a military presence on campus to recruit qualified individuals to serve as Judge Advocates in and of itself conjures up an immediate impression of a discriminatory institution. It also sullies every American in uniform, past, present, and future. To ensure, however, that the students, faculty, and public do not erroneously perceive the educational institutions as endorsing the policies of the United States Armed Forces, the law schools are free to disclaim any policy held by any recruiting organization, including the United States Armed Forces. These schools can express their disagreement with the policies of the military through any appropriate means. Moreover, institutions that want to separate themselves completely from the policies of the military recruiters can simply decline to accept assistance from the federal government.

These vast distinctions illustrate that the burden imposed on the law schools' associational interests is significantly less than the burden imposed on the Boy Scouts of America by the New Jersey statute in *Dale*. Therefore, unlike *Dale*, the impact of the Solomon Amendment on law schools' interests in expressive

association is far too remote to *significantly* affect the group's ability to advocate its viewpoint.

3. The government's interest justifies the burden it imposes on the group's expressive association.

Furthermore, even if the application of the Solomon Amendment does result in a minor burden on the law schools' right of expressive association, that burden is justified because it serves the compelling government interest in raising and supporting a military.

The need for a national defense mandates well disciplined and ready forces. Top-quality Judge Advocates are essential to maintaining good order and discipline as well as advising combatant commanders during ongoing operations. The on-campus interview process is critical to Judge Advocate recruiting.[58] Enforcement of the Solomon Amendment is therefore necessary to further the government's compelling interest in defending this nation at home and abroad.

Based on the foregoing, the application of the Solomon Amendment to law schools does not violate the right of expressive association afforded under the First Amendment.

D. The Solomon Amendment satisfies the intermediate scrutiny test for expressive conduct as set forth in *United States v. O'Brien*.

As this honorable Court noted, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. at 376. "This Court has long recognized the need to

[58] Declaration of Major General Jack L. Rives, U.S. Air Force, at 5-7, *FAIR* (No. 03-4433).

differentiate between legislation that targets expression and legislation that targets conduct for legitimate non-speech-related reasons but imposes an incidental burden on expression." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 604 (2001) (Justice Souter dissenting). The law schools, in their endeavor to exclude military recruiters, are engaging in a course of conduct that contains both nonspeech and speech elements.

This honorable Court has held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. The constitutional framework for evaluating such a government regulation is provided in *O'Brien*, and states that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

1. The Solomon Amendment is within the constitutional power of the government to raise, support, and maintain a military.

There has been no dispute that the Solomon Amendment is within the constitutional power of Congress. Congress has the constitutional power "[t]o raise and support armies . . . [and] to provide and maintain a navy . . . " Const. art. I, § 8, cl. 12-13. Additionally, the Constitution enables Congress "[t]o make all laws which shall be necessary and proper" for maintaining a strong military and defending our nation. Const. art. I, § 8, cl. 18. Furthermore, "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *O'Brien*, 391

U.S. at 377 (citing *Lichter v. United States*, 334 U.S. 742, 755-758 (1948); *Selective Draft Law Cases*, 245 U.S. 366 (1918); *Ex parte Quirin*, 317 U.S. 1, 25-26 (1942)). Therefore, the Solomon Amendment is within the constitutional power of the government to raise and support a military.

2. The Solomon Amendment furthers an important or substantial governmental interest.

Judge Advocates "have been extremely involved in homeland defense and the war on terrorism."[59] Although the more common role of the Judge Advocate is to administer the military justice system,

> [j]udge advocates provide direct advice and assistance on a daily basis to combatant commanders on issues ranging from military justice to rules of engagement, real-time target assessments, reviews of target lists, helping to establish war crime tribunals in Iraq and Afghanistan, interpretation of international treaties and advice under the law of armed conflict, to name but a few.[60]

The role of the Judge Advocate is an integral component of the security of the United States and the rule of law in the Armed Forces. Because of this important function, it is essential that the United States Armed Forces are able to recruit the most highly qualified men and women to serve as Judge Advocates. The on-campus interview process is critical to successful Judge Advocate recruiting.[61] The interviews "provide[] the most efficient and effective means by which the [military] can compete

[59] Report of the Judge Advocate General of the United States Air Force, Presented to the ABA Annual Meeting 2 (Feb. 6-7, 2004).

[60] *Declaration of Rear Admiral Jeffrey L. Fowler, United States Navy, at 2, FAIR* (No. 03-4433).

[61] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 5-7, *FAIR* (No. 03-4433).

with higher paying employers and meet the strong demand for face-to-face interaction with interested applicants."[62] Law students learn about Judge Advocate opportunities from on-campus visits by Judge Advocate recruiters. Because the Solomon Amendment seeks to ensure that military recruiters are granted access to conduct on-campus interviews, the legislation seeks to maintain the requisite recruiting, accession, readiness, and preparedness in the Judge Advocate corps of the most talented attorneys, and therefore, furthers an important or substantial governmental interest in national security.

3. The Solomon Amendment is unrelated to the suppression of free expression.

Enforcement of the Solomon Amendment is unrelated to the suppression of ideas. The Solomon Amendment merely requires equal access for military recruiters.

> [L]aw schools are free to take ameliorative actions to disclaim any endorsement of the military's recruiting policy; in fact, law schools can outright denounce the military without running afoul of the Solomon Amendment's prohibitions. For the non-communicative impact of their conduct, and for nothing else, will law schools transgress the Solomon Amendment.

FAIR v. Rumsfeld, 291 F.Supp.2d 269, 314 (D.N.J. 2003) (citing *O'Brien*, 391 U.S. at 383). Those institutions of higher education that accept federal funds, and thus fall under the purview of the Solomon Amendment, are free to openly criticize the United States Armed Forces and its policies without the risk of losing federal funds. Therefore, the Solomon Amendment does not in any way suppress the free expression of the educational institutions to which it applies.

[62] *Id.* at 6.

4. The incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of Congress's interest in raising and maintaining a military.

The law schools, through their own recruiting procedures, have set forth what they consider "essential" conditions to effectively recruit talented and capable individuals on their respective campuses. Law schools that provide recruiters with interview facilities, disperse recruiter information, and provide assistance in scheduling interviews and setting up interview space are manifesting their own assessment of what is needed for recruiters to successfully reach potential recruits. The equal access requirement of the Solomon Amendment "is no greater than is essential" and will survive the *O'Brien* test so long as the requirement "promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985).

The Solomon Amendment requires only equal access. It requires that these institutions give military recruiters access to the same resources that the institutions have *themselves* deemed "essential" for effective recruiting on their campuses. If these recruiting practices and procedures were not the most effective way to recruit individuals, the educational institutions would not be partaking in them. On that same note, if these recruiting practices were not the most effective way to recruit potential employees, employers would not be accepting offers to recruit on campuses, nor would they be incurring the costs necessary to do so.

Therefore, the institutions, by their own actions, have set forth what is "essential" for effective recruiting. The Solomon Amendment, by requiring only equal access to what the institutions have themselves deemed "essential" for effective recruiting, is placing no greater incidental restriction on First Amendment freedoms than is necessary to further the government's interest in recruiting

Judge Advocates to serve in the United States Armed Forces. Enforcement of the equal-access requirement does not "suppress substantially more speech than . . . necessary to ensure" the effectiveness of on-campus Judge Advocate recruiting. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 668 (1994).

To satisfy the *O'Brien* standard, regulations of conduct that place incidental burdens on expression are not subject to a least-restrictive-alternative requirement. *See Turner Broad. Sys.*, 512 U.S. at 662 ("a regulation need not be the least speech-restrictive means of advancing the Government's interests"). The less stringent, intermediate scrutiny test is to be applied in circumstances where the government action has only an incidental effect on the right to free speech or expressive association. *See Pi Lambda Pi Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 446 (3d Cir. 2000) (citing *O'Brien*, 391 U.S. 367).

CONCLUSION

The equal-access requirement of the Solomon Amendment survives strict scrutiny as it is a narrowly tailored, and the least restrictive, means of advancing the government's compelling interest in recruiting the requisite quality and quantity of Judge Advocates to serve in the United States Armed Forces. The primary purpose of the Solomon Amendment is to compel or limit conduct, and not speech or expression. If the equal-access requirement of the Solomon Amendment does affect speech or expression, the effect is incidental. As enforcement of the Solomon Amendment affects the rights of freedom of speech and expressive association in an indirect and less immediate fashion, the more appropriate test to be applied would be the less stringent, intermediate scrutiny test.

The Solomon Amendment is a valid exercise of Congressional spending power under the Constitution, and Congress and our military leaders have determined that enforcement of the Solomon Amendment is the only effective means of ensuring that top-quality law student

leaders are entering the Judge Advocates General's Corps. Denying Judge Advocate recruiters the access needed to conduct on-campus interviews will have a detrimental impact on the Judge Advocate General's Corps and hinder their ability to contribute to the national security of the United States.

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

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